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ACTION

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FARMERS INVESTMENT COMPANY,
a corporation,

Plaintiff,

vs.

THE ANACONDA COMPANY, et al.,

Defendants.

NO. 116542

RESPONSE OF DEFENDANT
STATE LAND DEPARTMENT TO
MOTION FOR SUMMARY JUDGMENT
ON COMMERCIAL LEASE NO. 906

THE CITY OF TUCSON,
a municipal corporation,

Plaintiff in
Intervention,

v.

FARMERS INVESTMENT COMPANY,

Defendants in
Intervention.

ANDREW L. BETTWY, as
State Land Commissioner and
THE STATE LAND DEPARTMENT,
a department of the State
of Arizona,

Defendants and
Cross-Claimants.

The legal issues in this matter have been fully set forth
by the Plaintiff FICO and the Defendant Pima Mining Company. The
State Land Department agrees with the position and arguments set
forth by Pima Mining Company in its Memorandum and adopts that
argument as its own. In addition to the argument set forth in
Defendant Pima Mining Company's Memorandum, Defendant State Land
Department would like to point out that the Plaintiff's argument,
if followed to its logical conclusion, would result in absurdity

1 in this Defendant's attempt to administer state trust lands. If
2 water is a product of state land as alleged by Plaintiff and can
3 only be sold at public auctions as natural products of state land
4 are sold under A.R.S. § 37-481, et seq., rather than being disposed
5 of as mineral products as is presently being done by the State
6 Land Department, the result would be that no agricultural lease
7 could be entered into permitting the lessee to use groundwater
8 for irrigation purposes on the lands subject to the lease.
9

10 It is the position of the Defendant State Land Department that it
11 would be patently absurd to attempt to separate the water from
12 the leasing procedures.

13 It is elementary law in Arizona that water is not subject
14 to appropriation. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173
15 (1953). Whether or not a particular use of water is within a
16 particular groundwater basin and is subject to restrictions placed
17 on critical groundwater areas necessarily involves determinations
18 of fact, to wit: (1) whether or not the water is indeed being
19 used outside of the groundwater basin (see Jarvis v. City of
20 Tucson, 104 Ariz. 527, 456 P.2d 385, modified 106 Ariz. 506, 479
21 P.2d 169 (1969); and (2) if the use is in compliance with the
22 critical groundwater code and the Jarvis case, whether or not the
23 use is a reasonable use, or, alternatively, whether or not it
24 constitutes a waste of water. Both of these issues are fundamental
25 fact issues which must be resolved prior to the consideration of
26 Plaintiff's motion.
27

28 Without wanting to become involved in the semantical
29 barbs being hurled by counsel, it seems to the State Land Depart-
30 ment that the motion for summary judgment is an attempt to
31
32

1 circumvent the real issue in the law suit -- whether or not the
2 transportation of groundwater from one location within a critical
3 groundwater area to a different location within the basin for
4 a commercial purpose is a reasonable use. This ultimate issue
5 should not be clouded by permitting Plaintiff to succeed in its
6 motion for summary judgment.
7

8 In the event it is determined, after factual issues are
9 resolved by this court, that water is a natural product of state
10 land, rather than a mineral product of state land, the factual
11 record could then be used to support or challenge such a conclusion.
12 Granting Plaintiff's motion in view of the ramifications that such
13 action would have on all of the agricultural, grazing, commercial
14 and mining leases issued by the State of Arizona would create
15 chaos and we believe it would be improvident for the court to
16 grant the relief asked for by Plaintiff at this time.
17

18 GARY K. NELSON

19 The Attorney General

20 PETER C. GULATTO

21 Assistant Attorney General

22 159 State Capitol

23 Phoenix, Arizona 85007

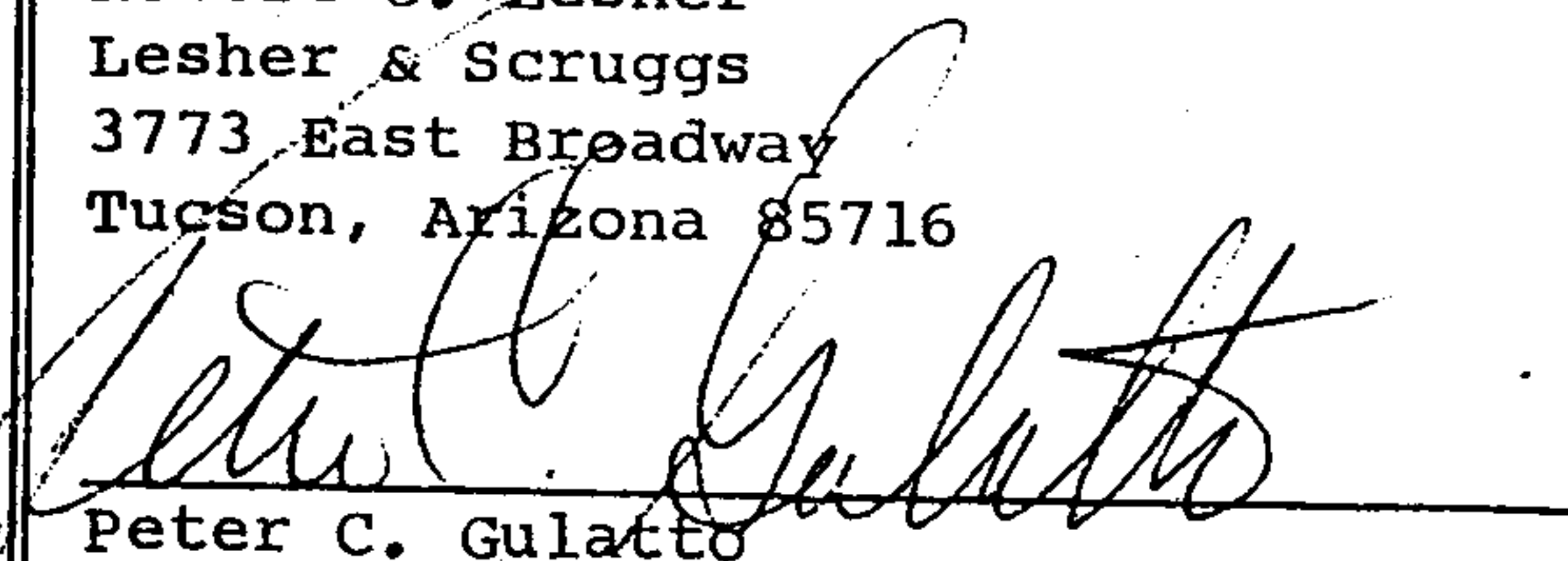
Attorneys for Defendant State Land
Department

24 COPY mailed this 7th day of
25 September, 1973, to:

26 Mark Wilmer
27 Snell & Wilmer
28 234 North Central, Suite 400
29 Phoenix, Arizona 85004
Attorneys for FICO

30 James W. Johnson
31 Fennemore, Craig, von Ammon & Udall
32 100 West Washington, Suite 1700
Phoenix, Arizona 85003

.....

- 1 Thomas Chandler
- 2 Chandler, Tullar, Udall & Richmond
- 3 1110 Transamerica Building
- 4 Tucson, Arizona 85701
- 5
- 6 Bruce A. Bevan, Jr.
- 7 Music, Peeler & Garrett
- 8 One Wilshire Boulevard
- 9 Los Angeles, California 90017
- 10
- 11 Verity & Smith
- 12 902 Transamerica Building
- 13 Tucson, Arizona 85701
- 14
- 15 Burton M. Apker
- 16 Evans, Kitchel & Jenckes
- 17 363 North First Avenue
- 18 Phoenix, Arizona 85003
- 19
- 20 Robert O. Leshner
- 21 Leshner & Scruggs
- 22 3773 East Broadway
- 23 Tucson, Arizona 85716
- 24
- 25 
- 26 Peter C. Gulatto
- 27
- 28
- 29
- 30
- 31
- 32